ORIGINAL

No. 02-10038 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT JAMES TENNARD,
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions at the punishment phase of Tennard's capital murder trial prevented the jury from giving mitigating effect to evidence of his subaverage intellectual functioning.

2. Whether the court of appeals properly refused to consider a claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), that had not been raised in that court, the federal district court, or the state courts of Texas.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Tennard is a Texas death-sentenced inmate seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying him a certificate of appealability ("COA") to appeal the federal district court's judgment denying habeas corpus relief.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals's opinion on direct appeal accurately summarizes the facts of the offense that led to Tennard's conviction and death sentence.

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marijuana with the eventual victims, Larry Neblett and Chester Smith, for about half an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand. [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims. Later that evening, the three men arrived at the home of Fred Stewart and Ruby Montgomery. [Tennard] enlisted Stewart to help sell the proceeds of the robbery. Stewart testified that [Tennard] gave him a couple of gasoline cards which he used to purchase gasoline. Stewart was arrested for the unauthorized use of the credit cards, and this ultimately resulted in [Tennard's] arrest.

Tennard v. State, 802 S.W.2d 678, 679 (Tex. Crim. App. 1990).

The Court of Criminal Appeals's opinion denying habeas corpus relief notes additional facts.

> [Tennard] lived behind the home of the victims, and he knew them. . . . [Tennard] stabbed [Neblett] fifteen times with a knife . . . [and] played a dominant role in disposing of the victims' stolen property. [Tennard] presented an alibi defense, and he presented other evidence from which the jury might have concluded that another person possibly could have committed the murders.

Ex parte Tennard, 960 S.W.2d 57, 58 (Tex. Crim. App. 1997).

II. Facts Relating to Punishment

The opinion of the Court of Criminal Appeals on state habeas review also accurately summarizes the evidence presented at the punishment phase of trial.

> [Tennard] had been on parole from a felony rape conviction for about three and one-half months when he committed this offense. The rape victim testified [Tennard] and two others forced her into a car while she was at a bus stop. Just after she was forced into the car, [Tennard], who was displaying about a foot-and-a half-long pipe-wrench, said to her, "[M]ove, white bitch, and you're dead."
>
> The victim testified [Tennard] and his friends took her to an abandoned apartment at some government project where [Tennard] forced her to engage in oral, vaginal and anal sex with him. After that, [Tennard's] two friends took turns sexually assaulting her.
>
> [Tennard] and his friends then took the victim to another house where Tennard began using drugs and discussing "pimping out" the victim. She asked [Tennard] if she could go to the bathroom to take a bath, which he allowed her to do:
>
> "Q. Now you told them that you wanted to take a bath?
>
> "A. Yes, I did.
>
> "Q. Did [Tennard] say anything?

"A. He told me I wasn't going to try to run away, was I.

"Q. What did you tell him?

"A. I told him, 'No, baby. I like you. I wouldn't do that.'"

After [Tennard] let the victim go to the bathroom, she escaped through a window, and [Tennard] was arrested later that day. The victim testified [Tennard] appeared to be the leader during her ordeal. [Tennard] impeached her testimony with a prior statement she made from which the jury could have inferred one of [Tennard's] friends was the leader.

[Tennard's] parole officer testified that a Texas Department of Correction's (TDC) record from [Tennard's] incarceration for the rape conviction indicated he had a 67 IQ.

* * * * *

During cross-examination of this witness, the State introduced the TDC record into evidence. This record appears to have been prepared approximately five years before [Tennard] committed this [capital murder] offense, and there is a notation on the record indicating [Tennard] had an IQ of 67. However, the witness could not say who prepared the report, or conducted the IQ test.

* * * * *

This is all the evidence presented at [Tennard's] 1986 trial on his "mental retardation." The term "mental retardation" is not mentioned anywhere in this record. [Tennard] also introduced evidence showing he was twenty-two years of age when he committed this offense, and he had spent most of his formative years incarcerated.

Ex parte Tennard, 960 S.W.2d at 58-59.

In addition, evidence was presented at trial reflecting that Tennard worked several

days a week at a labor pool, 27 SF 1039;[1] navigated the bus system of the City of Houston, 21 SF 192; was aware of the value of various items and how to sell stolen articles, 21 SF 178, 181, 232; was aware of the need to prevent fingerprints and a method to achieve that goal, 22 SF 405-06; was aware of the need to dispose of physical evidence, 22 SF 413; and was able to care for his nieces and nephews. 27 SF 1022. Although he was represented by a lawyer, Tennard filed several sworn *pro se* pleadings reflecting his knowledge of the offense alleged against him, the circumstances surrounding his arrest, and his ability to comprehend legal principles. Tr 84-113.

In his opening remarks, the second-chair prosecutor explicitly acknowledged that the jury could consider evidence of Tennard's low IQ score:

> I'm sure the Defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance. Well, ladies and gentlemen, you be the judge of that. If you feel like that's what you need to do, then that's what you need to do. . . .

29 SF 72. Thereafter, during the defense's closing argument, Tennard's trial counsel likewise reminded the jury that it could consider all the evidence in answering the special issues, including the evidence of Tennard's low IQ score. 29 SF 85, 93-94. In rebuttal, the lead prosecutor argued that Tennard's IQ score, standing alone, possessed little mitigating value.

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[1] The statement of facts (record of trial testimony) is referred to "SF," the transcript of papers filed in state court is referred to as "Tr," the and the state habeas corpus record as "*Ex parte Tennard*." Volume numbers precede and page numbers follow all record citations.

> Mr. Scardino [defense counsel] has told you that the Defendant has an IQ of 67. We heard no expert testimony of a psychiatrist who administered a battery of psychological tests. All we have got is this little piece of paper with a number of things listed in which someone -- we don't know who has -- written in 67.

29 SF 97-98. He also argued that "whether he has a low IQ or not is not really the issue." 29 SF 98.

At the conclusion of the punishment phase, two statutory special issues were submitted to the jury: (1) whether Tennard deliberately killed his victim, and (2) whether there was a probability that Tennard would commit criminal acts of violence that would constitute a continuing threat to society. Tr 170-71.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Tennard advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Punishment-Phase Jury Instructions Were Constitutionally Sound.

A. Standard of review

Before a habeas petitioner can appeal an adverse district court judgment, he must

obtain a COA. 28 U.S.C. § 2253(c)(1). To do so, he must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), *i.e.*, that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1042 (2003). Because a COA is "a jurisdictional prerequisite," without one "federal court of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 1039.

Moreover, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000). Those statutory provisions provide a state prisoner may not obtain relief

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 1996).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court

> has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

(Terry) Williams v. Taylor, 529 U.S. 362, 412-13 (2000)).

B. The Fifth Circuit's judgment on original submission

On original submission in the court below, Tennard argued that the rule of *Penry I*[2] was violated because the punishment-phase issues that were submitted to his jury did not allow for full consideration of evidence that he is mentally retarded. In rejecting this claim, the Fifth Circuit noted that the Court of Criminal Appeals had found as a factual matter that he is not retarded. Because Tennard did not present clear and convincing evidence to the contrary, the Fifth Circuit correctly held that under the AEDPA it was "required to afford a presumption of correctness to this factual finding." *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1) and *Davis v. Scott*, 51 F.3d 457, 461 n.4 (5th Cir. 1995)). Thus, because Tennard failed to prove that he is retarded, he was not entitled to an additional jury instruction.

> The flaw in Tennard's argument is that he did not establish or argue to the jury that he was mentally retarded. A prison document provided that Tennard had an IQ score of 67. There was no evidence introduced with respect to the meaning of the score, nor its relation to Tennard's moral culpability. As stated, the term "mental retardation" was never articulated before the jury. This dearth of evidence is in stark contrast to the "substantial mitigating evidence that Penry was mentally retarded."

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[2] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Id. at 596 (quoting *Penry v. Johnson*, 261 F.3d 541 (5th Cir. 2001)).[3] Tennard apparently concedes that this finding forecloses any assertion of mental retardation in fact, as his petition in this Court does not assert that he is retarded and instead argues only that he has established "low intellectual functioning." Petition at i, 4, 11, 13.

The Fifth Circuit also held that Tennard's "claim must fail because he made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d at 597. This holding was based on circuit precedent requiring a habeas petitioner bringing a *Penry* claim to demonstrate that the proffered evidence was constitutionally relevant mitigating evidence that was beyond the effective reach of the jurors. *Davis v. Scott*, 51 F.3d at 460. To be constitutionally relevant, mitigating evidence must demonstrate (1) a uniquely severe permanent handicap, with which the defendant was burdened through no fault of his own, and (2) that the criminal act was attributable to this

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[3] In contrast to Tennard's single IQ score of 67, Penry presented a wealth of evidence of retardation. Dr. Jerome Brown, a clinical psychologist, testified during a competency hearing before trial. *Penry*, 492 U.S. at 307. According to Brown, Penry was mentally retarded, had been previously diagnosed with organic brain damage, and had an IQ at 54. *Id.* at 307-08. Brown's testing also showed that Penry's mental functioning was that of a 6½-year-old, and his social maturity was that of a 9- or 10-year-old. *Id.* At trial, Penry presented the testimony of Dr. Jose Garcia, a psychiatrist. *Id.* "Dr. Garcia [also] testified that Penry suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and an inability to learn from experience." *Id.* He further explained that Penry's organic brain disorder did not permit him "to appreciate the wrongfulness of his conduct or to conform his conduct to the law." *Id.* Penry's mother also testified that Penry always had trouble learning in school and never finished the first grade. *Id.* Moreover, both of the State's psychiatrists "acknowledged that Penry was a person of extremely limited mental ability, and that he seemed unable to learn from his mistakes." *Id.* at 310.

condition. *Id.* at 460-61.

Tennard takes issue with the second prong of this test, arguing that the Fifth Circuit's "nexus" requirement is not supported by this Court's precedent. Petition at 9-14. He is incorrect. *Penry I* is limited in scope, as it was "a straightforward application of our earlier rulings" and "did not 'effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute.'" *Johnson v. Texas*, 509 U.S. 350, 365 (1993) (quoting *Graham v. Collins*, 506 U.S. 461, 474 (1993)). *Penry I* did not announce a "new rule," as it was dictated by *Eddings v. Oklahma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). *Penry I*, 492 U.S. at 318-19.

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

The Court has "not construed the *Lockett* lines of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant." *Johnson v. Texas*, 509 U.S. at 371. Extending the rule of *Penry I* beyond the facts of that case would require overruling *Jurek v. Texas*, 428 U.S. 262 (1976), and "the Texas special issues system in almost every case would have to be supplemented by a further instruction." *Id.* at 372.

Moreover, it would "entail an alteration of the rule of *Lockett* and *Eddings*. . . .[so as to] require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.*

Following this line of authority, the Fifth Circuit "has limited *Penry* to the facts of that case; in other words, in all of the cases we have considered, we have found a *Penry I* problem to exists only where the petitioner presents mitigating evidence relating either to severe mental retardation or extreme child abuse." *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002). For mitigating evidence to be constitutionally relevant, the defendant "must demonstrate that there is a nexus between the criminal act and the mitigating evidence presented to explain it." *Id.* at 681 (citing *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997)). The nexus requirement is met if the evidence would allow a rational jury to infer that the crime is at least partially attributable to the defendant's background. *Id.* Of particular relevance to Tennard's claim, the Fifth Circuit consistently has held that evidence of subnormal intellectual functioning does not warrant an additional instruction where the petitioner fails to show that the criminal act was attributable to his low intelligence. *Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996); *Lackey v. Scott*, 28 F.3d 486, 489 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994).

Tennard argues that the nexus rule is based on this Court's dicta and thus "is not a proper basis for determining the merits of a *Penry* claim." Petition at 10. In the court below, Judge Dennis likewise argued in dissent that "the majority relies on and applies prior

decisions of this circuit which were based on the dicta, as opposed to the holding, of *Penry I*." 284 F.3d at 603. According to Judge Dennis, this Court's interpretation of the statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in *Williams v. Taylor* "dictates that we determine whether a state-court habeas corpus adjudication resulted in a decision that was contrary to clearly established Federal law by applying the holdings of the Supreme Court decisions, rather than Supreme Court dicta or our own decisions based on such dicta." *Id.* at 604.

There are two flaws in this approach. First, contrary to Judge Dennis's view, implicit in the holdings of *Lockett, Eddings*, and *Penry* is that death-sentenced prisoners be required to demonstrate a connection between purportedly mitigating evidence and their criminal acts. The "attribution" requirement of *Lockett, Eddings*, and *Penry* is not "mere *obiter dicta*, but rather . . . the well-established rationale upon which the Court based the results of its earlier decisions." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to the result by which we are bound." *Id.* The approach utilized by the court below is entirely consistent with, at the least, the underlying basis for decision in *Lockett, Eddings*, and *Penry*.

Second, and perhaps of greater significance, there is no requirement that the Fifth Circuit's nexus rule be based on "clearly established Federal law." That statutory phrase is a codification of the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). *Williams*

v. Taylor, 529 U.S. at 379.

> The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." . . . It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent on a rule of law not clearly established at the time the state conviction became final.

Id. at 379-80. In this context, consistent with *Teague*, the statute also limits the source of clearly established law to decisions of this Court. Moreover, the phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

Plainly, then, "clearly established law" represents a hurdle that a habeas petitioner must surmount to obtain relief under the AEDPA. By contrast, the prohibition against new rules has no application in determining whether a rule that limits a defendant's right to federal habeas review should be applied retroactively. *Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993). Consequently, "the State will benefit from [the] *Teague* decision in some federal habeas cases, while the habeas petitioner will not." *Id.* at 373. Thus, even if the Fifth Circuit's nexus rule is based on this Court's dicta rather than its holdings, which the Director denies, it nonetheless constitutes a valid basis for deciding *Penry* claims. *See, e.g., Brown v. United States*, 2003 WL 1989618 (9th Cir. 2003) (in light of Supreme Court dicta, "only the most persuasive arguments to the contrary would give us pause"); *United States v. Fareed*, 296 F.3d 243, 247 (4th Cir. 2002) (following dictum endorsed by six justices); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002) ("Appellate courts have noted

that they are obligated to follow Supreme Court *dicta*, particularly where there is no substantial reason for disregarding it . . . ."); *United States v. Caro*, 260 F.3d 1209, 1210 (10th Cir. 2001) ("we accord great weight to the dicta of the Supreme Court"). Regardless whether the Fifth Circuit's nexus rule is based on clearly established law within the meaning of the AEDPA, it is an appropriate analytical tool for determining whether a capital murder defendant's proffered mitigating evidence warrants a supplemental jury instruction under *Penry*.

Moreover, contrary to Tennard's implications, the rule is not used to defeat petitioners's otherwise meritorious *Penry* allegations, but, rather, to winnow out valid claims based on evidence similar to that offered by Penry. Illustrative of this point is *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. 2002), in which the court of appeals affirmed the district court's grant of relief on a *Penry* claim. "The facts of this case are different from those in *Tennard*. The record evidence raised an inference sufficient to satisfy *Tennard's* requirements of handicap and nexus to the crime." *Id.* at 321. Tennard's arguments against the nexus rule do not raise a debatable federal constitutional issue, much less one important enough to warrant exercise of this Court's certiorari jurisdiction.

C. The Fifth Circuit's judgment on remand

After the Fifth Circuit's initial denial of a COA, Tennard sought certiorari review of his *Penry* claim; this Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)."

Tennard v. Cockrell, 123 S. Ct. 70 (2002). On remand, the court of appeals refused to consider any claim based on *Atkins* and reinstated its panel opinion affirming the district court's denial of habeas relief. The court noted that "Tennard has never argued that the Eighth Amendment prohibits his execution." *Tennard v. Cockrell*, 317 F.3d 476, 477 (5th Cir. 2003). "Accordingly, because Tennard has not raised the Eighth Amendment claim addressed in *Atkins*, such a claim is not properly before us." *Id.* (citing *Smith v. Cockrell*, 311 F.3d 661, 684 (5th Cir. 2002), and *Smith v. Bowersox*, 311 F.3d 915, 923 (8th Cir. 2002)).

According to Tennard, he argued in his previous petition for writ of certiorari "that the then-recent decision in *Atkins v. Virginia* . . . made the use of the nexus rule in a case like his inappropriate." Petition at 7-8. Thus, he argues, the Fifth Circuit did not comply with the remand order because "[i]t did not consider the effect of *Atkins v. Virginia* on its resolution of the *Penry* issue . . . ." Petition at 8. He is incorrect.

Atkins set out a bright-line rule prohibiting the execution of mentally retarded individuals. Under *Atkins*, a capital defendant who establishes mental retardation is constitutionally protected, and *Penry* and its progeny do not come into play. In short, *Atkins* has no bearing on the resolution of *Penry* issues, and thus this Court's remand order could not have contemplated reconsideration of Tennard's *Penry* claim in light of *Atkins*. Instead, because Tennard's prior petition raised the possibility of mental retardation, including a sub-70 IQ score, remand was a prudent disposition to protect against the possibility of a

substantive *Atkins* violation.

Likewise, the Fifth Circuit acted prudently in refusing to consider a claim that was not properly before it. Tennard does not, because he cannot, cite any authority for the proposition that his case is an exception to the general rule that appellate courts will not consider unassigned error. *E.g., Smith v. Cockrell*, 311 F.3d at 685 ("We have consistently refused to address issues in the habeas context raised for the first time on appeal"). Indeed, the refusal to do so is particularly appropriate with regard to allegations based on *Atkins*. Tennard never has presented his *Atkins* claim to the state courts and thus has not exhausted his state remedies as required by 28 U.S.C. § 2254(b). He can return to state court to do so, however, and then reurge the matter in federal court if state-court relief is not forthcoming. This approach is consistent with the Fifth Circuit's recognition that

> [i]n these circumstances, inferior federal courts have no useful role to play until and unless following *Atkins*, a death sentence is reaffirmed or again imposed on Bell by the state courts. Just how the state courts will implement *Atkins*, we cannot say. Clearly, however, the state must be given the first opportunity to apply the Supreme Court's holding in order to insure consistency among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule.

Bell v. Cockrell, 310 F.3d 330, 332-33 (5th Cir. 2002). *See also Smith v. Cockrell*, 311 F.3d at 685 ("As the Texas courts have not yet had [the] opportunity [to develop standards for defining who is ineligible for execution under *Atkins*], we decline to usurp their position as the ultimate arbiter of state law"); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (the State "should have the opportunity to develop its own procedures for determining whether

a particular claimant is retarded and ineligible for death"). The Fifth Circuit's remand order is entirely consistent with established appellate procedures and does not present a cert.-worthy federal constitutional issue.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Tennard's petition for writ of certiorari be denied.

Respectfully submitted,

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No. 02-10038

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JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
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To the United States Court of Appeals
For the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 5th day of June, 2003, one copy of **RESPONDENT'S BRIEF IN OPPOSITION** was sent by United States mail to: Mandy Welch, Burr & Welch, 10511 Dunbrook Drive, Houston, Texas 77070. All parties required to be served have been served. I am a member of the Bar of this Court.

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OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 5, 2003

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Robert James Tennard v. Janie Cockrell*, No. 02-10038

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

CHARLES A. PALMER
Assistant Attorney General
(512) 936-1600

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Enclosures
cc: Mandy Welch
Burr & Welch
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Houston, Texas 77070